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No. 343

OCTOBER TERM, 1945

THOMAS W. NEALON

PETITIONER,

v.

HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN
BUILDING & LOAN ASSOCIATION, A CORPORATION,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF

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**In the
Supreme Court of the United States**

THOMAS W. NEALON

PETITIONER,

v.

HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN
BUILDING & LOAN ASSOCIATION, A CORPORATION,
RESPONDENT.

*ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT*

TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED
STATES:

The petitioner respectfully prays for a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered June 29, 1945 (R. 704) dismissing an appeal from two orders of the United States District Court for the District of Arizona, sitting at Phoenix, entered on December 7, 1942 (R. 243) and on November 29, 1944. (R. 657).

The order entered December 7, 1942, awarded

to petitioner fees and expenses incurred as solicitor for creditors of Intermountain Building & Loan Association, wherein creditors of that association, individually, and as a class, instituted a suit in the United States District Court for the District of Arizona for the appointment of a receiver of the assets of that association. (R. 2).

Petitioner filed a petition on March 31, 1944 (R. 599) to review and rehear the order of December 7, 1942. That petition was dismissed by the district court November 29, 1944. (R. 657). The trial judge did not deliver an opinion on the order of December 7, 1942, nor on the order of November 29, 1944. On December 7, 1944 petitioner appealed to the Circuit Court of Appeals from the order of December 7, 1942 and also from the order of November 29, 1944. (R. 666).

OPINION OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals rendered an opinion on June 29, 1945, which is not as yet reported but is included in the Transcript of Record, beginning at page 704.

The Circuit Court of Appeals granted the receiver's motion to dismiss the appeal (R. 690) because, as the opinion recites, (1) the appeal was not taken in time from the order of December 7, 1942, (2) appellant (petitioner) waived his right to appeal from that order by accepting the benefits of the order¹, (3) the order of November 29, 1944 was not appealable. (R. 706).

¹The opinion discloses that this ground of motion to dismiss was not considered by the Circuit Court of Appeals.

**JURISDICTION OF THE SUPREME COURT OF
THE UNITED STATES**

This court has jurisdiction to review by certiorari the decision and judgment of the Circuit Court of Appeals. § 240 (a) of the Judicial Code, as amended, 28 USCA, § 347 (a).²

Petition for rehearing was denied by the Circuit Court of Appeals on July 23, 1945. (R. 708). On that day, the Circuit Court of Appeals stayed the mandate until August 31, 1945, conditioned upon the filing of this petition within that time. (R. 708, 709).

CONSTITUTION, STATUTES AND RULES INVOLVED

No provision of the Federal Constitution is involved, nor are statutes except as they are incidental to matters which are involved. Petitioner believes important questions of practice are presented by a construction given some of the Rules of Civil Procedure by the Circuit Court of Appeals which petitioner thinks is wrong.

SUMMARY STATEMENT OF MATTERS INVOLVED

I

Petitioner rendered extensive services as solicitor for creditors of Intermountain Building & Loan Association in a creditors' class suit which eventuated in the appointment of a receiver for that association by the United States District Court for the District of Arizona. (R. 400). On October 15, 1937, petitioner filed a petition in the district court for solicitor's fees and expenses incurred in the preparation and trial of the credit-

²This section is printed in the appendix at page 33.

ors' suit. (R. 108-162). The extent of petitioner's services is indicated by several decisions of the Circuit Court of Appeals for the Ninth Circuit.*

II

The petition filed October 15, 1937, requested compensation for services rendered and expenses incurred in the creditors' suit. (R. 160, 161, 162). After the appointment of the first receiver petitioner served as his attorney under appointment of the district court. (R. 378). The order of December 7, 1942, recited that it was a final award of compensation for services rendered by petitioner to the petitioning creditors in the class suit and also to the receiver. (R. 243-248).

The petition filed October 15, 1937 (R. 108-164) came on for hearing December 20, 1937. (R. 245). After a lapse of five years, the order of December 7, 1942 followed. Petitioner did not then appeal from that order, but on March 31, 1944 he filed a petition to rehear it. (R. 599). The district court dismissed the petition with prejudice by the order entered November 29, 1944. (R. 657).

The petition to rehear the order of December 7,

**Intermountain Building & Loan Association, et al v. Gallegos, et al*, 9 Cir., 78 Fed. 2d 972; cert. den. 296 U. S. 639, 80 L. Ed. 454, 56 S. Ct. 172.

Guadalupe R. Gallegos, et al v. Lloyd R. Smith, Corporation Commissioner, 9 Cir., 111 Fed. 2d 805; cert. den. 311 U. S. 668, 85 L. Ed. 429, 61 S. Ct. 27.

Julius G. Brashear v. Intermountain Building & Loan Association, et al, 9 Cir., 109 Fed. 2d 857; cert. den. 311 U. S. 655, 85 L. Ed. 419, 61 S. Ct. 9.

Monaghan v. Hill, as Receiver, 9 Cir., 140 Fed. 2d 31.

1942, was filed beyond the 10 day period prescribed by Rule 59 (b) of the Rules of Civil Procedure.⁴

On December 7, 1944, petitioner appealed from the order of December 7, 1942, and also from the order of November 29, 1944. (R. 666). The appeal was taken more than three months after the order of December 7, 1942 was entered, § 230, Title 28 USCA⁵, but within three months after the order of November 29, 1944 was entered.

The district court entertained, considered and then dismissed the petition filed March 31, 1944 (R. 599) to rehear the order of December 7, 1942 (R. 243) as appears from the following proceedings had in the district court:

- (a) On March 31, 1944, petitioner filed the petition in the district court to review and rehear the order of December 7, 1942. (R. 599).
- (b) The respondent, as receiver, on May 8, 1944, filed an answer to the petition filed March 31, 1944. (R. 632).
- (c) The district court, after the petition and answer were filed, ordered a pre-trial conference, and by an order entered June 7, 1944, adopted the issues formulated by respective counsel, thus entertaining the petition and answer and the issues as formulated. (R. 643-651).⁶

⁴Rule 59 is printed in the appendix at page 33.

⁵This section is printed in the appendix at pages 33, 34.

⁶Pre-trial conference is authorized by Rule 16 of Rules of Civil Procedure. The rule is printed in the appendix at page 34.

- (d) Petitioner on November 21, 1944, moved to submit for decision the petition filed by him March 31, 1944. (R. 651).
- (e) Respective counsel on November 22, 1944, stipulated to submit the petition for consideration and decision by the trial court on briefs which had been theretofore filed (R. 652) and the trial court so ordered. (R. 653).
- (f) Respondent on November 22, 1944, filed a motion for an order to deny and dismiss the petition filed March 31, 1944. (R. 653).
- (g) After considering the foregoing proceedings, and the issues raised by them, the trial court on November 29, 1944, entered an order denying the petition filed March 31, 1944 and dismissed it with prejudice. (R. 657).

Petitioner asserted that the trial court, by entertaining, considering and dismissing the petition filed March 31, 1944 to rehear the order entered December 7, 1942, opened that order for review by appeal to the Circuit Court of Appeals under the rule of the following decisions:

Wayne United Gas Co. v. Owens-Illinois Co., 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.

Bowman v. Lopereno, 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201.

Pfister v. Northern Illinois Finance Co., 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

The Circuit Court of Appeals concluded that since those decisions related only to proceedings in bankruptcy, they are inapplicable to this receivership proceeding in equity. (R. 706).

III

Rule 60 (b) of the Rules of Civil Procedure, 28 USCA, following § 723 (c), provides as follows:

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLIGENCE. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not effect the finality of a judgment or suspend its operation. *This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.* (Italics supplied).

Petitioner also invoked the italicized exception contained in the foregoing rule for authority of the district court to review the order of December 7, 1942. (R. 243). The Circuit Court of Appeals apparently concluded otherwise, since its opinion does not refer to the rule.

IV

The Circuit Court of Appeals, by its opinion dismissing the appeal, thought the petition of March 31, 1944, filed after the expiration of the term, came too late. (R. 706).

Rule 6 (c) of the Rules of Civil Procedure provides that the expiration of the term of the district court does not affect or limit the power of that court to entertain the petition filed March 31, 1944'. The Circuit Court of Appeals apparently concluded that the rule had no application to the proceedings had in the district court.

V

In a companion case, the Circuit Court of Appeals held that the order entered in that case on December 7, 1942 was final for the purpose of appeal. *Monaghan v Hill*, 9 Cir., 140 Fed. 2d 31. The order appealed from in that case likewise awarded solicitor's fees in this receivership proceedings. (R. 239). The Circuit Court of Appeals, by its decision in that case, had no occasion to decide, and did not decide, that the order of December 7, 1942, affecting petitioner, although appealable, could not be subsequently reviewed by the district court

⁷Rule 6 (c) of the Rules of Civil Procedure, 28 USCA, following § 723 (c), provides:

Unaffected By Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

after the time for appeal had expired but before the final decree in the receivership proceedings was entered.

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals for the Ninth Circuit erred in dismissing petitioner's appeal from the order of the district court entered December 7, 1942 (R. 243), and from the order of the district court entered November 29, 1944 (R. 657) which denied and dismissed the petition filed March 31, 1944 (R. 599) to rehear the order of December 7, 1942, for the reason that the district court entertained, considered and then dismissed the petition filed March 31, 1944 to rehear the order of December 7, 1942, thus placing both orders under review by the Circuit Court of Appeals for error asserted by the appeal taken from them on December 7, 1944. (R. 666).

2. The United States Circuit Court of Appeals for the Ninth Circuit erred in dismissing the appeal because the term of the district court had expired at the time the petition of March 31, 1944 was filed to rehear the order of December 7, 1942, for the reason that the filing of the petition on March 31, 1944 to rehear the order of December 7, 1942, and the entertainment of that petition by the district court, was not affected or limited by the term of court in this proceeding in equity not closed, particularly in view of Rule 6 (c) of the Rules of Civil Procedure which became effective before the order of December 7, 1942 was entered.

3. The United States Circuit Court of Appeals

for the Ninth Circuit erred in dismissing the appeal from the orders of the district court of December 7, 1942, and November 29, 1944, for the reason that the district court was empowered in this proceeding in equity, under subdivision (1) contained in the last sentence of Rule 60 (b) of the Rules of Civil Procedure, to rehear the order of December 7, 1942, and the district court having exercised that power, the Circuit Court of Appeals was then empowered and required to entertain the appeal to review the orders of December 7, 1942 and November 29, 1944 for error asserted.

4. The United States Circuit Court of Appeals for the Ninth Circuit erred in dismissing the appeal from the orders of December 7, 1942 and November 29, 1944 because not taken within the time allowed to appeal from the order of December 7, 1942, for the reason that although that order was subject to review by timely appeal, the failure of petitioner to invoke that remedy did not preclude him, while this proceedings in equity was not closed, from petitioning the district court to rehear the order of December 7, 1942, as petitioner did by the petition filed March 31, 1944.

QUESTION PRESENTED

Whether the time was enlarged to appeal from the order entered by the district court on December 7, 1942, awarding solicitor's fees to petitioner, by that court entertaining and dismissing the petition to rehear that order filed March 31, 1944, which was filed after the expiration of the term within which the order of December 7, 1942 was entered,

and after the time provided for filing the petition to rehear the order, and after the time to appeal from the order, but filed in a receivership proceedings in equity still open.

REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT

Petitioner believes that the Circuit Court of Appeals, by dismissing petitioner's appeal, has erroneously decided an important question of federal practice, which, in its application to a receivership proceedings in equity not closed, has not been, but should be, settled by this court; and has decided a question of federal practice pertaining to a receivership proceeding in equity not closed in a way probably in conflict with applicable decisions of this court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Honorable Court for its review and determination, on a day certain to be named therein, the full and complete transcript of record and all the proceedings entitled as in the caption of this petition, and catalogued in the lower court as No. 10961, and that, after review, the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit, made and entered in this cause, may be reversed by this Honorable Court, and that your petitioner may have such

other and further relief in the premises as may seem meet and just.

And your petitioner will ever pray.

LESLIE C. HARDY,
Counsel for Petitioner

THOMAS W. NEALON
Pro se

CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner herein, who is a member of the bar of this court, does hereby certify that the foregoing petition for writ of certiorari in his opinion is well founded and meritorious, and does further certify that it is not interposed and filed for the purpose of delay.

LESLIE C. HARDY,
Counsel for Petitioner